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No. 03-1429

IN THE

Supreme Court of the United States

4-MALI, L.L.C.,

Petitioner,

v.

BANKERS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the trial court err in refusing to grant Appellant 4-Mali, LLC's Motion for summary judgment, finding insurance coverage for removal and replacement of shelves necessary for the repair and replacement of a flood-damaged floor located in their leased premises under the National Flood Insurance Program policy?

2. Did the trial court err in granting Appellee Bankers Insurance Company's Motion for summary judgment, finding that Appellant 4-Mali, LLC did not submit a timely proof of loss statement, when Bankers made an unconditional tender for other damages with knowledge that Appellant intended to seek recovery of shelf-moving expenses?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Bankers Insurance Company is wholly owned by Bankers Insurance Group, which is a privately held company.

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INTRODUCTION

This lawsuit arose over Bankers Insurance Company's ("Bankers") decision not to pay 4-Mali, LLC ("4-Mali") additional federal benefits for a flood claim presented under a Standard Flood Insurance Policy ("SFIP"), which is a codified federal regulation found at 44 C.F.R. Pt. 61, App. A(2) (1999 edition). As more fully discussed herein, this claim falls within the National Flood Insurance Program ("NFIP"), which was created by the National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4001, *et seq.*).

Bankers is a Write-Your-Own ("WYO") NFIP carrier authorized to issue the federal government's SFIP pursuant to its "Arrangement" with the Federal Emergency Management Agency ("FEMA"). Although the Arrangement, codified at 44 C.F.R. Pt. 62, App. A, authorizes Bankers to issue the SFIP under its own logo, Bankers cannot alter, amend, or waive any of the terms or provisions of the SFIP. *See* 44 C.F.R. § 61.13(d) and 44 C.F.R. Pt. 61, App. A(2), Art. 8(D). The structure of the NFIP is such that only FEMA can make regulatory decisions regarding NFIP claims (42 U.S.C. § 4019), and only the federal courts may adjudicate those claims (42 U.S.C. § 4072). The reason for this is that U.S. Treasury funds are used directly (not through a reimbursement mechanism) to pay both the claims and the adjustment of the claims. 42 U.S.C. § 4017(d); *see also* 44 C.F.R. Pt. 62, App. A, Art. II and III. Because U.S. Treasury funds are used to pay flood claims, presentment and payment of flood claims must be in strict compliance with the terms of the SFIP and the requirements of the NFIP. Otherwise, such claim payments would be in a manner not sanctioned by the U.S. Congress and a violation of the Appropriations Clause of the U.S. Constitution. U.S. Const. Art. I, § 9, cl. 7. It is within this context that Bankers chose to not pay 4-Mali additional federal benefits.

At the outset, Bankers advises the Court that Petitioner has presented its questions for review contrary to their proper sequence. Conditions precedent for presentment of a flood claim should be addressed first, *i.e.*, whether 4-Mali submitted a signed and sworn proof of loss statement for the damages claimed. However, Petitioner frames this issue second as to whether the trial court erred in granting Bankers' motion for summary judgment finding that 4-Mali did not submit a timely proof of loss statement. If an insured fails to properly present a flood claim, then coverage never becomes an issue. This is the exact point made by the U.S. Fifth Circuit's *per curiam* decision affirming Bankers' motion for summary judgment, and it held that "4-Mali's failure to provide a proof of loss statement within 60 days of the flood precludes coverage. *See Gowland v. Aetna*, 143 F.3d 351, 353-54 (5th Cir. 1998). As such, we need not evaluate the scope of the SFIP's coverage." (Petition for Writ, Appendix 16a)

If an insured has met the conditions precedent for presenting its flood claim, which are set forth at 44 C.F.R. Pt. 61, App. A(2), Art. 8(O), then the scope of coverage may be at issue. Yet, as stated by the U.S. Fifth Circuit, there is no need to evaluate the scope of coverage if the insured has not preserved the claim with a proper, timely, signed and sworn proof of loss statement. Despite the U.S. Fifth Circuit's holding, Petitioner initially frames the coverage issue for this Court's review. This issue being whether the trial court erred in denying 4-Mali's motion for summary judgment for insurance coverage for the removal and resetting of the lessees' shelves and contents in order to effect repairs to the insured building's floor.

In the case at bar, it is without dispute that 4-Mali failed to provide a proof of loss statement for the cost of removing and resetting the shelving and contents within the insured building. As more fully discussed below, Petitioner loosely mixes the concepts of "notice," "proof of loss statement," and "documentation" in such a manner as to create confusion as to the real issue, that is whether the insured submitted a proof of loss statement within 60 days of the flood loss. Clearly, 4-Mali did not. Moreover, seven of the appellate circuits have unanimously held that failure to submit a signed and sworn proof of loss statement within 60 days of the flood loss is a bar to recovery. The appellate courts' decisions have been based upon this Court's holdings and guidance regarding federal programs that are underwritten with U.S. Treasury funds in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); and *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). For these reasons, this Court should deny 4-Mali's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Factual Background

On June 27, 2000, a sudden rainfall caused a flooding event on MacArthur Drive in Alexandria, Rapides Parish, Louisiana. Located on MacArthur Drive was the immovable property known as the Power Center. The Power Center was owned by 4-Mali. 4-Mali, as owner of the immovable property, had leased the premises to tenants, namely Hobby Lobby, Office Depot, and the Alexandria Furniture Outlet.

On that date, the building structure was insured by a Standard Flood Insurance Policy (44 C.F.R. Pt. 61, App. A(2)

(1999 edition)), issued by Bankers in its capacity as a WYO NFIP carrier. Said SFIP had coverage limits of $474,800, subject to a $5,000 deductible. 4-Mali timely notified Bankers of a potential flood loss to the insured premises.

In response to this notification, Bankers dispatched David Babcock, an independent adjuster, to assist 4-Mali in presenting its flood claim to the WYO carrier. Mr. Babcock met with the insured and prepared a proof of loss form with the net damage claim of $166,978.19, "omitting the cost of removal and resetting of the contents and shelving at the lessees' stores." (Petition for Writ, p. 4) Based upon this proof of loss statement, Bankers tendered payment to 4-Mali in the amount of $166,978.19 on August 10, 2000. (Petition for Writ, p. 5)

Bankers continued to investigate the flood loss and determined that an additional $58,539.37 was due under the SFIP. (Petition for Writ, p. 6) 4-Mali submitted a second proof of loss statement for these damages. (*Id.*) In return, Bankers tendered payment of $58,539.37 for these damages. Notably, neither proof of loss statement contained the cost of removing and resetting the shelving and contents owned by the lessees.

Nonetheless, and in an effort to assist 4-Mali, Bankers contacted the NFIP Bureau and Statistical Agent claims manager, Joseph Buzzelli, for an interpretation of whether coverage should be afforded for the cost of removing and resetting the lessees' shelving and contents. By letter dated December 13, 2000, Mr. Buzzelli advised Bankers of the following:

> Because you insure the building and because the shelves are not permanently installed or owned by your insured, the SFIP you issued will not pay

> to remove and reinstall them, even though that it is necessary to make building repairs. If the tenants have coverage, the cost would be acceptable under their tenant's policy.

(Petition for Writ, App. 32a) Therefore, even if Petitioner had submitted a signed and sworn proof of loss statement for these damages, Bankers could not pay for these damages as the NFIP Bureau and Statistical Agent had determined that coverage is not afforded. Ironically, due to the structure of the NFIP, Bankers would have received a 3.3 percent commission on the payment of such claim. *See* 44 C.F.R. Pt. 62, App. A, Arts. III(C) and (D). Thus, Bankers had no incentive whatsoever to deny the claim other than it did not fit within the parameters of the NFIP.

Course of the Proceedings and Disposition of the Court Below

On June 27, 2001, 4-Mali filed a Complaint for damages against Bankers in the United States District Court for the Western District of Louisiana. After the parties conducted discovery, motions for summary judgment were filed by each party. On November 26, 2002, 4-Mali filed its motion for summary judgment. On December 13, 2002, Bankers filed its opposition to 4-Mali's motion for summary judgment. Then, on January 6, 2003, Bankers filed its own motion for summary judgment, and 4-Mali filed its memorandum in opposition on January 21, 2003. In response, the district court consolidated the motions for summary judgment for consideration without oral argument.

On April 28, 2003, the United States District Court for the Western District of Louisiana rendered judgment in favor of Bankers granting its motion for summary judgment and

denying 4-Mali's motion for summary judgment. (Petition for Writ, App. 1a) Further, the Court entered a memorandum accompanying the judgment setting forth the reasons for judgment. (Petition for Writ, App. 3a) Petitioner 4-Mali then appealed the district court's ruling to the United States Fifth Circuit Court of Appeals, submitting its appellant's brief on June 3, 2003. Bankers submitted its appellee's brief on July 21, 2003. On December 11, 2003, the United States Fifth Circuit rendered its *per curium* decision affirming the trial court's grant of Bankers' motion for summary judgment. (Petition for Writ, App. 16a) Subsequently, 4-Mali petitioned for rehearing to the U.S. Fifth Circuit. The U.S. Fifth Circuit denied the Petition for Rehearing on January 14, 2004. (Petition for Writ, App. 20a) Subsequently, 4-Mali has filed its Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with any decision of this Court. Indeed, the lower court's decision is predicated upon this Court's holdings involving the Appropriations Clause of the U.S. Constitution. As U.S. Treasury funds are used to directly pay flood claims, strict compliance with the terms of the SFIP and provisions of the NFIP is required by insured and insurer alike. Seven appellate circuits have addressed the issue of whether the failure of an insured to submit a timely, signed and sworn proof of loss statement for flood damages is a bar to recovery. All seven are unanimous: *no proof of loss = no payment*! As for the coverage issue, respectfully it should not be addressed as it does not become viable until Petitioner meets the conditions precedent for presentment of its claim.

I. The is No Circuit Split on the Question Presented regarding the requirement of a Proof of Loss Statement (Petitioner's Issue Number Two)

First, and foremost, this very issue has been reviewed by seven appellate courts, and all seven have held that failure to meet the conditions precedent for a flood claim, *i.e.*, submitting a signed and sworn proof of loss statement for the claimed damages within 60 days of the flood loss, is fatal. In fact the U.S. Fifth Circuit summed it up as follows:

> As the provisions of an insurance policy issued pursuant to a federal program must be strictly construed and enforced, [FN4] we hold that an insured's failure to provide a complete, sworn proof of loss statement, as required by the flood insurance policy, relieves the federal insurer's obligation to pay what otherwise might be a valid claim.
>
> FN4. *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).

Gowland v. Aetna, 143 F.3d 951, 954 (5th Cir. 1998). The six other appellate circuits to rule on this exact issue are as follows:

> *Phelps v. FEMA*, 785 F.2d 13, 19 (1st Cir. 1986)
>
> *Dawkins v. Witt*, 318 F.3d 606, 612 (4th Cir. 2003)
>
> *Neuser v. Hocker*, 246 F.3d 508, 511-12 (6th Cir. 2001)
>
> *Mancini v. Redland Ins. Co.*, 248 F.3d 729, 735 (8th Cir. 2001)

Flick v. Liberty Mutual Fire Ins. Co., 205 F.3d 386, 395 (9th Cir. 2000), *cert. denied* 531 U.S. 927 (2000)

Sanz v. U.S. Security Ins. Co., 328 F.3d 1314, 1319 (11th Cir. 2003)

Each and every decision is the same. Failure by an insured to submit a signed and sworn proof of loss statement is a bar to recovery. As will be explained below, the NFIP's viability is based upon the necessity of uniformity of decision. An examination of each of these individual appellate decisions reaffirms the theme of having a uniform national rule. The appellate decisions are based upon this Court's holdings in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (hereafter "*Merrill*"); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) ("*OPM v. Richmond*"); and *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Moreover, with the exception of *Phelps*, *supra*, the appellate decisions are based upon this Court's decision in *OPM v. Richmond*, 496 U.S. 414 (1990).

Respondent, in candor to the Court, advises the Court that in 1982, the U.S. Seventh Circuit ruled that the proof of loss requirement could not be strictly enforced by the FEMA. *Meister Bros. Inc. v. Macy, Dir. of FEMA*, 674 F.2d 1174, 1177 (7th Cir. 1982). Notably, even that court held that its decision was limited "holding to the facts of this case." *Id.* Further, it was during this year that the language of the SFIP was changed to prevent the very result in *Meister Bros.*, *supra*. Lastly, this case pre-dates this Court's 1990 holding in *OPM v. Richmond*, *supra*. For these reasons, the Seventh Circuit's decision in *Meister Bros. Inc.*, *supra*, should be accorded no weight whatsoever.

Given that the appellate circuits have uniformly held that a proof of loss statement is a condition precedent for presentment of a flood claim, and that failure to submit same by the insured is a bar to recovery, the instant Petition for Writ should be denied.

II. Structure and History of the National Flood Insurance Program

To assist the Court in understanding the necessity of the proof of loss requirement, Bankers submits the following structure and history of the NFIP for the Court's review.

The National Flood Insurance Program was established by Congress in 1968 pursuant to the National Flood Insurance Act ("NFIA").[1] The NFIP is a federally-subsidized program which provides flood insurance *at below actuarial rates*.[2] (It is thus *designed* to lose money and to be a burden on the U.S. Taxpayer.[3]) Congress created the program because of the unavailability of flood insurance from private insurance companies, who were unable to write flood insurance policies on an economically-feasible basis.[4] Private insurers could not write flood insurance economically because "the public was not interested in purchasing flood insurance."[5]

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1. 42 U.S.C. § 4001, *et seq*.

2. *See Van Holt v. Liberty Mutual Ins. Co.*, 163 F.3d 161, 165 n.2 (3d Cir. 1998); *Gowland v. Aetna*, 143 F.3d 951, 953 (5th Cir. 1998); *Wagner v. Director, FEMA*, 847 F.2d 515, 517 (9th Cir. 1988).

3. Understand, however, that without the NFIP, the taxpayers' annual bill for federally financed flood related disaster relief would be *far* higher. 42 U.S.C. § § 4001 and 4002. *Till*, *infra*.

4. *Id*.

5. *Flick v. Liberty Mutual Fire Ins. Co.*, 205 F.3d 386, 387 (9th Cir. 2000), *cert. denied*, 531 U.S. 927 (2000).

Congress created the program to accomplish two objectives: (1) provide property owners with economically feasible flood insurance otherwise unavailable; and (2) to require that new construction in flood prone areas be located and built in a manner that would reduce loss of life and property.[6] As held by the U.S. Fifth Circuit, *Till v. Unifirst Fed. Savings & Loan Assoc.*, 653 F.2d 152, 159 (5th Cir. 1981),[7] protection of the federal fisc (the U.S. Treasury) was "the principal purpose" for why the Program was created:

> [T]he principal purpose in enacting the Program was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever-increasing federal flood disaster assistance.

Initially, the Program operated and was administered primarily through the National Flood Insurers Association, an unincorporated pool of private insurers, under the supervision of and with financial support from the Department of Housing and Urban Development ("HUD").[8] The Association issued and serviced individual policies of flood insurance, processed claims for losses and accepted responsibility for the defense of legal actions brought by policyholders under these agreements until December 31, 1977.

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6. H.R. Rep. No. 786, 90th Congress, 2d Session (1967); S. Rep. No. 1123, 90th Congress, 1st Session (1967).

7. *See also* the "Congressional findings and declaration of purpose" found at 42 U.S.C. § § 4001 and 4002.

8. *Van Holt*, *supra*; *Wagner*, *supra*; *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946; 42 U.S.C. § 4041.

Some five years after the NFIP was established, Congress enacted the Flood Disaster Protection Act of 1973. The purpose of this enactment was as follows:

> The availability of subsidized flood insurance under the National Flood Insurance Act of 1968 did not, by itself, provide sufficient incentive to attract extensive local community enrollment in the Program.

Texas Landowners Rights Assoc. v. Harris 453 F. Supp. 1025, 1027 (D.C. 1978), *affirmed*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied*, 440 U.S. 946 (1979).

Texas Landowners explains that Congress passed the 1973 legislation to further its goals for the NFIP. The Judge in *Texas Landowners* explained that the original Act and the 1973 Amendment created "a carrot and a stick" federal program. *Id.* at 1030. *Texas Landowners* represents a critical foundation for all subsequent judicial interpretation of the NFIP *because* it establishes that: (a) insurance is just one half of the equation of the NFIP; and (b) *all* judicial analysis should seek to further Congress' goals and intentions for this important and multifaceted federal program.

On January 1, 1978, pursuant to 42 U.S.C. § 4071, the Secretary of HUD terminated that "Arrangement" and assumed the administration of the Program.[9] "HUD assumed full control of the program with the intention of retaining, to the full extent practicable, the services of private insurers as 'fiscal agents' of the United States."[10] Also, during 1978, the original Fifth Circuit issued its decision in the landmark NFIP

9. 42 Fed. Reg. 25701.

10. *Flick*, 205 F.3d at 388-89.

case of *West*, *supra*. In *West*, 573 F.2d at 880-81, the Fifth Circuit based its choice of law ruling upon the following foundational principles which still govern all Program jurisprudence today:

> Congress has undertaken to regulate the claims adjustment process and judicial review thereof, and nowhere in these statutory sections or in the regulations implementing them, 24 C.F.R. § 1912.21, 1912.22 (1977), is there any mention of use of the statutory law of the forum state on any issue.
>
> * * *
>
> Since the Flood Insurance Program is a child of Congress, conceived to achieve policies which are national in scope, and since the federal government participates extensively in the Program both in a supervisory capacity and financially, it is clear that the interest in the uniformity of decision present in this case mandates the application of federal law.

Shortly after *West*, on April 1, 1979, via Executive Order, and pursuant to Reorganization Plan No. 3 of 1978,[11] FEMA was made principally responsible for the Program's operation.[12] Subsequent to this switch, the Program began operating financially through the National Flood Insurance Fund established by the Director of FEMA "in the Treasury of the United States."[13] Note, the Treasury's exposure to the

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11. 43 Fed. Reg. 41943.

12. Executive Order 12127; 44 Fed. Reg. 19367.

13. 42 U.S.C. § 4017.

NFIP includes *both* the "cost incurred in the adjustment *and* payment of any claims for flood losses."[14] Under Plan B of the NFIA (under which the Program presently operates), the Director of FEMA carries out the Program through the facilities of the Federal Government.[15]

In 1982, FEMA exercised its rule-making authority to make a number of different changes to Program regulations, as well as to the Standard Flood Insurance Policy. With regard to these rules changes, FEMA made the following announcement within the Federal Register on May 4, 1982:

> SUPPLEMENTARY INFORMATION: On December 30, 1981, FEMA published for comment in the Federal Register (Vol. 46, p. 63085) a proposed rule containing revisions to the SFIP which were intended to support the major FEMA goals of, in the near term, attaining greater effectiveness in the operation of the NFIP, and, for the longer term, an enhanced level of fiscal self sufficiency in terms of reductions in the cost of the Program. Thus, both risk management and cost containment are being achieved through the addition of coverage restrictions aimed at reducing flood losses and lost payments. (Federal Register, Vol. 47, p. 19138)

Among the said rules changes, was the inclusion of what is now Article 8(O)(6) of the SFIP (44 C.F.R., Pt. 61, App. A(2) (1999 edition)), which reads as follows:

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14. 42 U.S.C. § 4017(d). The Federal Government – not any of the States – pays for the adjustment of NFIP claims.

15. 42 U.S.C. § 4071(a).

> 6. The insurance adjuster whom the Insurer hires to investigate the claim may furnish the Insured with a proof of loss form, and she and or he may help the Insured to complete it. However, this is a matter of courtesy only, and the Insured must still send the Insurer a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help the Insured complete it. In completing the proof of loss, the Insured must use its own judgment concerning the amount of loss and the justification for that amount.
>
> The adjuster is not authorized to approve or disapprove claims or tell the Insured whether the claim will be approved by the Insurer.

This change in the SFIP is pertinent to the case at bar, as Petitioner has did not submit a signed and sworn proof of loss statement for the damages claimed in the lawsuit.

As to this specific provision of the SFIP, the U.S. Ninth Circuit explained in *Wagner* that this provision "candidly warns potential claimants not to rely on FEMA's assistance in complying with the proof of loss requirement." 847 F.2d at 520. Accordingly, and as a matter of federal law, FEMA exercised the rule-making authority granted it by Congress to bar flood insurance claimants from making any claim that it was the insurer's fault that a proof of loss was not filed in compliance with the conditions precedents section of the SFIP. Moreover, because of this specific rules change, all prior case law indicating that FEMA could be estopped from enforcing the proof of loss requirement because of acts or omissions made by an adjuster is no longer good law.[16]

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16. This would include *Meister Bros. v. Macy*, 674 F.2d 1174 (7th Cir. 1982); *Dempsey v. Dir. of FEMA*, 549 F. Supp 1334 (E.D.

(Cont'd)

In light of what is now Article 8(O)(6) of the SFIP, none of those decisions remain good law today. *See OPM v. Richmond, supra*, which reaffirmed the underpinnings of this Court's 1947 decision in *Merrill, supra*.

In 1983, two events occurred which are of special importance to the development of the NFIP: 1) Congress amended both NFIP jurisdictional statutes, 42 U.S.C. §§ 4053 and 4072, to add the words "original exclusive" in front of the word "jurisdiction," and 2) FEMA exercised its authority under 42 U.S.C. § 4071 to create the Write-Your-Own Program. *See* 42 U.S.C. § 4071(a); 44 C.F.R. § 62.23; and 48 Fed. Reg. 46, 789 (1983). In doing so, the Director exercised his statutory authority to utilize federal employees and/or private "insurance companies and other insurers, insurance agents and brokers, and insurance adjustment organizations, *as fiscal agents of the United States*."[17] Thus, acting under direct Congressional authority, FEMA by regulation[18] provided for marketing and claims adjustment of the SFIP[19] by private insurers operating as "Write-Your-

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Ark. 1982), and *Del Boring Tire Serv. v. FEMA*, 496 F. Supp. 616 (W.D. Pa. 1980). Note: The author of *Del Boring Tire Service* is the same judge who later penned *Brookville Mining v. Selective*, 74 F. Supp. 2d 477 (W.D. Pa. 1999), which repudiated the holding in *Del Boring Tire Service*.

17. 42 U.S.C. § 4071(a)(1). Emphasis added in text.

18. 42 U.S.C. § § 4013(a) and 4019.

19. Three SFIPs have been promulgated by FEMA and set forth in the Appendices of 44 C.F.R. Part 61: App. A(1) - the Dwelling Form, App. A(2) - the General Property Form, and App. A(3) - the Residential Condominium Building Association Policy.

Own" companies, at U.S. Treasury expense.[20] Accordingly, as was held in *Gowland, by statute* [42 U.S.C. § 4071(a)(1)], "these companies are fiscal agents of the United States." 143 F.3d at 953. Today, "these companies" write over 90% of all SFIPs in the country. For this reason, a ruling as to any WYO company is a ruling as to the *entire* Program. In addition, because of these two events occurring in 1983, any case law relating to *jurisdiction* to hear NFIP cases decided *prior to* 1983 is no longer relevant.[21] *See Flick, supra*; *Van Holt, supra*.

Since 1983, the WYO Program companies have issued SFIPs in their names[22] collecting premiums in segregated accounts from which they pay claims and make necessary refunds under those policies.[23] Premiums collected from policy holders by the WYO Program companies are, after deduction of the companies' fees and administrative costs, deposited in the National Flood Insurance Fund in the United States Treasury.[24] Premiums are federal funds from the moment they are collected, with interest earned thereon belonging to the United States.[25] WYO Program companies pay claims and make refunds by drawing on FEMA letters of credit from the U.S. Treasury.[26]

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20. 44 C.F.R. § 62.23.

21. Actually, any case law regarding the NFIP issued prior to the Supreme Court's 1990 decision of *OPM v. Richmond, supra*, which is inconsistent with that decision, is most likely no longer good law.

22. 44 C.F.R. § § 61.13(f), 62.23(a).

23. 44 C.F.R. Pt. 62, App. A, Arts. II(E), III(D), III(E).

24. 42 U.S.C. § 4017(d).

25. 44 C.F.R. Pt. 62, App. A, Art VII, B.

26. *See* 44 C.F.R. Pt. 62, App. A. Art. IV.

From an *operational* perspective, federal law provides (because it is federal funds which are at stake) that no provision of an SFIP may be altered, varied, or waived other than by the express written consent of the Federal Insurance Administrator.[27] All SFIPs contain this exact same express prohibition against waiver.[28] As such, the WYO Program companies may not alter the terms of the SFIP as dictated by FEMA. Consequently, as held in *Gowland*, all WYO carriers are bound by federal law to "strictly construe and enforce" all SFIP provisions. 143 F.3d at 953. Thus, the WYO carriers *cannot* simply *decline* to strictly enforce federal law in the handling of NFIP claims. To do so would be to violate federal law, perhaps even criminally. *OPM v. Richmond*, *supra*.

There is also a second reason *why* WYO carriers are forbidden from waiving Program rules. As was discussed in *Texas Landowners*, 453 F. Supp. at 1030, the NFIP is a "carrot and stick" federal program. The insurance (carrot) part of the Program is found at 44 C.F.R. Part 61; however, the flood plain management zoning regulations (the stick) are found at 44 C.F.R. Part 60. Unlike with a private insurance policy, the flood policy is designed to promote FEMA's goals of saving both lives and property through changing the way people build their homes in flood-prone areas. In the NFIP, FEMA is using both zoning *and* insurance *together* to accomplish the objectives of Congress for the Program. Accordingly, since over 90% of all flood policies are now written by the WYO Program carriers, it is obviously critical to FEMA's mission that the carriers not defy FEMA's rules, and, that the Courts uphold the rule of law that the carriers

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27. 44 C.F.R. § § 61.4(b), 61.13(d), 61.13(e), 62.23(c), and 62.23(d); *Gowland*, *supra*.

28. 44 C.F.R. Pt. 61, App. A(2) Art. 8(D).

must strictly adhere to FEMA's rules. In this regard, and as held in both the *Gowland* and *Flick* decisions, FEMA has put in place regulations pursuant to direct statutory authority that *only* it may waive Program rules.

In 1998 and 1999, the FEMA Office of General Counsel, acting with the U.S. Department of Justice and the U.S. Solicitor General, intervened into three different WYO Program cases, before three different U.S. Appellate Circuits. These efforts resulted in decisions of the Third, Fifth, and Ninth Circuits, respectively in *Van Holt* (on rehearing), *supra*, in *Gowland*, *supra*, and in *McHugh v. U.S.A.A.*, 164 F.3d 451 (9th Cir. 1999) (on rehearing). The purpose of these efforts was to restore uniformity of decision. Perhaps of most importance from the said three cases, is the following passage found in the *Van Holt* rehearing decision, 163 F.3d at 166-67:

> As the United States argues, § 4072 provides subject-matter jurisdiction for an insured's suits against a WYO arising out of a disputed flood insurance claim though the plain text appears to restrict the reach of § 4072 to suits against FEMA. For several reasons, a suit against a WYO company is the functional equivalent of a suit against FEMA. First, a WYO company is a fiscal agent of the United States. 42 U.S.C. § 4071(a)(1). Second, FEMA regulations require a WYO company to defend claims but assure that FEMA will reimburse the WYO for defense costs. 44 C.F.R. § 62.23(i)(6). Third, an insured's flood insurance claims are ultimately paid by FEMA. After a WYO company depletes its net premium income, FEMA reimburses the company for the company's claims payments. 44 C.F.R. Pt. 62,

> App. A, Art. IV(A). When a WYO company's proceeds from insurance premiums exceeds its current expenditures, it must pay the excess proceeds to the FIA. 44 C.F.R. Pt. 62, App. A, Art. VII(B). Although a WYO company collects premiums and disburses claims, only FEMA bears the risk under the flood insurance program. Thus, a lawsuit against a WYO company is, in reality, a suit against FEMA. Cf. Gowland, 143 F.3d at 954-55 (refusing to estop WYO company due to relationship between company and FEMA).

In closing, please note that the stakes are enormous – currently over *$400 billion* worth of federal flood insurance is in force, spread over four million policies. Without "uniformity,"[29] the viability of such an enormous federal program is questionable.[30] As was noted by the Ninth Circuit in *Flick*, there is a "compelling interest" in assuring uniformity of decision in cases involving the NFIP. 205 F.3d at 390. Accordingly, it is irrefutable that the NFIP is a creation of the U.S. Congress, designed to be regulated by FEMA, interpreted exclusively by the federal courts, in such a manner as to create uniform national rules, such as the proof of loss requirement.

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29. *See West*, 573 F.2d at 881, regarding the importance of uniformity of decisions.

30. Note that Congress has already declared that "Availability of funds [is] dependent on future appropriation acts." 42 U.S.C. § 4017(f).

III. No Proof of Loss Statement = No Payment

As a foundational point, flood claims presented under an SFIP are paid with U.S. Treasury funds. 44 C.F.R. Pt. 62, App. A, Arts. II and III; *see also Gowland*, 143 F.3d at 955. As discussed in *Flick*, *supra*, the Appropriations Clause of the Constitution controls the payment of such claims, and it requires strict interpretation of the SFIP's provisions and compliance thereof.

The SFIP states that no suit shall be sustainable "unless all the requirements of this policy have been complied with." 44 C.F.R. Pt. 61, App. A(2), Art. 8(T). The SFIP sets forth in detail the requirements for presenting a flood claim at Article 8(O):

Should a flood loss occur to the insured property, the Insured must:

> 1. Notify the Insurer in writing as soon as practicable;
>
> 2. As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that the Insurer may examine it; and
>
> 3. Within 60 days after the loss, send the Insurer a proof of loss, which is the Insured's statement as to the amount it is claiming under the policy signed and sworn to by the Insured and furnishing the following information:
>
> a. The date and time of the loss;
>
> b. A brief explanation of how the loss happened;

c. The Insured's interest in the property damaged (for example, "owner") and the interest, if any, of others in the damaged property;

d. The actual cash value of each damaged item of insured property and the amount of damages sustained;

e. Names of mortgagees or anyone else having a lien, charge or claim against the insured property;

f. Details as to any other contracts of insurance coverage the property, whether valid or not;

g. Details of any changes in ownership, use, occupancy, location or possession of the insured property since the policy was issued;

h. Details as to who occupied any insured building at the time of loss and for what purpose; and

i. The amount the Insured claims is due under this policy to cover the loss, including statements concerning:

(1) The limits of coverage stated in the policy; and

(2) The cost to repair or replace the damaged property (whichever costs less).

In the present matter, Petitioner clearly admits that it did not submit a signed and sworn proof loss statement for the

removal and resetting of the lessees' shelving and contents in order to effect repairs to the floor of the insured building.

Petitioner argues that Bankers knew about the claim for the cost of removal and resetting of the shelving and contents, and that this should be sufficient. It is not. Indeed, Bankers was aware of this claim, as it contacted the NFIP Bureau and Statistical Agent for interpretation of coverage under the SFIP. (*See* Petition for Writ, App. 32a) The NFIP Bureau and Statistical Agent determined that coverage was not afforded for such claims. Irrespective of Bankers' knowledge, the terms of the SFIP are clear – the insured must submit a signed and sworn proof of loss statement within 60 days of the flood loss. All of the appellate circuit decisions require strict compliance with this provision of the SFIP. In the case at bar, 4-Mali simply failed to submit a proof of loss statement for these damages.

Instead, Petitioner misapplies the case of *S.A. Burns v. FEMA*, 84 F. Supp. 2d 839 (S.D. Tex. 2000) to the facts at bar. The *Burns* case involved a different condition precedent than the proof of loss requirement. In *Burns*, the issue was over 44 C.F.R. Pt. 61, App. A(1), Article 9(J)(5).[31] 84 F.Supp.2d at 841. Article 9(J)(5) requires that the insured "Document the loss with all bills, receipts, and related documents for the amount being claimed." What Article 9(J)(5) does *not* require is the strict 60 day time period in which to submit the documentation. This was so held by *Burns*. *Id.* at 847. Notably, *Burns* specifically noted that there was ample authority that the proof of loss statement must be submitted within 60 days. *Id.* at 845. The court then stated

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31. This was a homeowners policy, and the policy at issue herein has an exact parallel provision at 44 C.F.R. Pt. 61, App. A(2), Art. 8(O)(5).

that FEMA was not complaining about the proof of loss requirement but the documentation clause. *Id.* Petitioner has attempted to meld the two distinct, separate clauses and requirements into one, and then create an amorphous proof of loss. This will not suffice when U.S. Treasury funds are at stake and the Appropriations Clause commands that all payments be in conformity with the requirements set forth by Congress. *See Flick*, *supra* discussing the importance of the Appropriations Clause.

Next, Petitioner presents a unique argument:

> While Bankers argues that an "estimate" is not a "Proof of Loss" Statement, no argument has been made that the estimates were not attached to both the "First Partial" and the "2nd Partial" Proofs of Loss submitted by 4-Mali.

(Petition for Writ, p. 16). It is true that Bankers argued that "estimates" are not proofs of loss in its motion for summary judgment before the district court. The district court noted that 4-Mali submitted the estimates. (Petition for Writ, App. 8a). Yet, the district court found that 4-Mali had not submitted a proof of loss. (Petition for Writ, App. 11a). It logically follows that an "estimate" is not a proof of loss statement.

The U.S. Eighth Circuit in *Mancini*, 248 F.3d at 734-35, went through a detailed analysis of the purpose of the proof of loss requirement and the necessity of complying with each term within the proof of loss statement. Indeed, substantial compliance and/or failure to swear under oath to an exact amount does not meet the proof of loss requirement. *Id.* For guidance, the *Mancini* court looked to this Court's holding in *Merrill*, 332 U.S. at 385, (stating that "the duty of all courts

to observe the conditions defined by Congress for charging the public treasury" imposes on citizens a corresponding duty to "'turn square corners when they deal with the Government'"). *Id.* at 734. Upon this premise, the Eighth Circuit affirmed that a complete, signed and sworn proof of loss statement is necessary for presentment of a flood claim. *Id.* at 735.

In the case at bar, admittedly, an estimate for the removal and resetting of the shelving and contents was attached to the proof of loss statements submitted to Bankers. However, the estimate was not signed or notarized, nor did it set forth the list of required information found at 44 C.F.R. Pt. 61, App. A(2), Art. 8(O)(3)(b), (c), (e) through (h). Hence, the estimate did not meet the requirements for a proof of loss statement, as per *Mancini*, 248 F.3d at 734-35, which is in accord with the *Merrill*, *supra* holding by this Court.

For all of these reasons, Respondent urges that the Petition for Writ be denied. Further, Respondent contends that because Petitioner has failed to meet the conditions precedent for presentment of its flood claim by failing to submit a proof of loss statement, addressing the Petitioner's First Issue of whether coverage is afforded under the SFIP is not necessary nor appropriate.

IV. No Coverage for Removal and Resetting the Lessees' Shelving and Contents Under the Owner's Building SFIP (Petitioner's Issue Number One)

Bankers contends that the Court need not address the issue of coverage because 4-Mali has not met the conditions precedent for presentment of the flood claim. For the sake of argument, Bankers will address the issue of coverage. Please recall that strict compliance and interpretation of the SFIP is demanded by the Appropriations Clause.

A careful study of the SFIP shows that there are no provisions contained therein for *removal and resetting of lessees' contents and shelving*. The SFIP is not ambiguous as to coverage for this issue – where there is not a clause providing coverage, there is no coverage. It is uncontested that the contents and shelving, that had to be moved in order to repair the floor, were not owned by the named Insured. Rather, they were owned by the Insured's tenants/lessees. No coverage is afforded pursuant to the SFIP. To extend coverage under the SFIP to bailee's good is not a risk contemplated by FEMA.

Petitioner argues that it is not seeking coverage for flood damage to the lessees' contents and shelving, but coverage merely for the removing and resetting of same. However, by removing and resetting property owned by tenants/lessees, the U.S. Treasury *becomes* the insurer for these items.

The SFIP is a policy of insurance that is limited in coverage. It was so designed because the NFIP is burden upon the U.S. taxpayers. However, the SFIP simply cannot codify every single scenario for losses that are not to be afforded covered under it. Nonetheless, a review of 44 C.F.R. Pt. 61, App. A(2), Art. 3 is illuminating. It is entitled "Article 3– Losses Not Covered". Therein, the SFIP sets forth several circumstances for which coverage is not afforded at the expense of the U.S. Treasury. For example, Art. 3 states as follows:

> The Insurer only provides coverage for direct physical loss by or from flood which means the following are not covered:
>
> A. Compensation, reimbursement or allowance for:

> 1. Loss of use of the insured property or premises.
>
> 2. Loss of access to the insured property or premises.
>
> 3. Loss of profits.
>
> 4. Loss resulting from interruption of business, profession, or manufacture.
>
> 5. Any additional expenses incurred while the insured building is being repaired or is uninhabitable for any reason.
>
> 6. Any increased cost of repair or reconstruction as a result of any ordinance regulating reconstruction or repair except as provided in Coverage D–Increased Cost of Compliance.
>
> 7. Any other economic loss.

Because the there is no provision within the SFIP regarding *removal and resetting of lessees' contents and shelving*, it is Bankers' position that such costs to the Insured would fall under Art. 3(A)(7) any other economic loss. Thus, Petitioner's claims in the case at bar are not afforded coverage .

However, Bankers attempted to assist 4-Mali with respect to this coverage question. Bankers contacted the NFIP Bureau and Statistical Agent, which is a private corporation set up by regulation to provide resolution of such issues on behalf of FEMA. *See* 44 C.F.R. § 62.23(i)(8). FEMA contracts with Computer Sciences Corporation, a private company, to act

as FEMA's NFIP Bureau and Statistical Agent. Upon Bankers' inquiry, the NFIP Bureau and Statistical Agent Claims Manager put it succinctly regarding the coverage issue:

> Because you insure the building and because the shelves are not permanently installed or owned by your insured, the SFIP you issued will not pay to remove and reinstall them, even though that it is necessary to make building repairs. If the tenants have coverage, the cost would be acceptable under their tenant's policy.

(Petition for Writ, App. 32a). At this point, Bankers was bound to follow the interpretation of coverage, or the lack thereof, made by FEMA's Bureau and Statistical Agent.

Notably, according to FEMA's NFIP Bureau and Statistical Agent, the cost of removing and resetting the lessees' shelving and contents could have been paid under the *tenants'* SFIP for contents coverage. Because tenants had no such policies, there was no coverage. Of last note, Petitioner attempts to bootstrap coverage to its SFIP building policy by arguing that the lease between 4-Mali and the tenants required 4-Mali to pay for repairs to the building structure. It is well established that a state law contract between two private parties cannot burden the U.S. Treasury.

For these reasons, there is no coverage for the cost of removing and resetting the lessees' shelving and contents under the building owner's (4-Mali) SFIP.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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